

In The

Supreme Court of the United States

Supreme Court, U.S.
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October Term, 1979

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No. 353

CARL GELFONT,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

*On Petition for Writ of Certiorari to the Supreme Court of
Pennsylvania*

**BRIEF IN OPPOSITION
FOR RESPONDENT**

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BRIEF IN OPPOSITION FOR RESPONDENT

STATEMENT OF THE CASE

The respondent adopts the statement of the case contained in the petition as substantially accurate. To the extent that the petitioner's statement of the case seeks to abbreviate the language contained in the affidavit in support of the search warrant, the respondent adopts the language of the affidavit set forth in full in the majority and dissenting opinions of the Superior Court of Pennsylvania and the opinion of the Court of

Common Pleas of Montgomery County, Pennsylvania (see Appendices to Petition for Writ of Certiorari, 10, 16, 17, 24). One factual inaccuracy of a procedural nature contained in the petition should be noted. The petition states "On June 4, 1979, the Supreme Court of Pennsylvania affirmed *per curiam*, without opinion." (Petition for Writ of Certiorari, 4). This language might mislead the Court into concluding that the Supreme Court of Pennsylvania passed upon this issue on the merits. The grant of an appeal to the Supreme Court of Pennsylvania for an offense committed under the Pennsylvania Drug Act is discretionary. A petition for allowance of appeal must first be granted. The considerations governing the grant of a petition for allowance of appeal are analogous to United States Supreme Court Rule 19, 28 U.S.C.A. See Pennsylvania Rules of Appellate Procedure (Pa. R.A.P.) No. 1114, 42 Pa. C.S.A. On June 4, 1979 a *per curiam* order was entered denying petitioner's petition for allowance of appeal (see Appendix to Petition for Writ of Certiorari, 32).

ARGUMENT

I.

The first prong of the *Aguilar/Spinelli* test was satisfied in this case.

The affidavit in support of the search warrant was approved by a neutral detached magistrate. Consequently, greater deference should be paid to a search conducted under those circumstances. The information supplied to the affiant did not come from a paid police informer. Instead, it came from a witness who was present inside the petitioner's home. This witness was an ordinary citizen, who has never been arrested, is gainfully employed, and is a registered voter. The majority of the Superior Court of Pennsylvania correctly determined that a sufficient basis of knowledge was possessed by the witness informant and set forth in the affidavit so that a neutral

detached magistrate could justifiably believe it was more probable than not that marijuana would be found at 3918 Warfield Drive, Huntingdon Valley, Pennsylvania. The articulable underlying circumstances provided by the witness informant amply support the magistrate's reasoned determination that marijuana was probably present.

The witness informant was recently physically present in the home of the petitioner when he personally observed or saw a large quantity of suspected marijuana. The witness knew the petitioner as Carl. The witness provided the affiant with an address of the home and a description of Carl as a white male weighing approximately 300 pounds. The information relating to the petitioner and his residence was corroborated by the affiant and is set forth in the affidavit in support of the search warrant. The magistrate could reasonably conclude that marijuana was probably where the warrant said it was because the magistrate knew that the witness informant made a visual observation. There is no erosion of Fourth Amendment protection when the affidavit contains an affirmative allegation that the witness informant spoke with personal knowledge. *Aguilar v. Texas*, 378 U.S. 108, 113, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). An independent judicial determination only requires that there be a substantial basis for the magistrate to conclude that marijuana was present; absolute conviction on the part of the magistrate is not the standard to be applied in the context of the sufficiency of an affidavit in support of a search warrant. *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

The use of the words "suspected marijuana" in the affidavit do not serve to negate the probable cause in this case. No drug can be positively identified as a controlled substance by anyone, no matter how expert, by mere visual observation. Only a chemical analysis would have absolutely confirmed that the substance in question was marijuana. However, that type of proof is only required at the time of trial to establish guilt beyond a reasonable doubt, and has absolutely no relevance to

the determination of probable cause in a search warrant. Any other view would cause the courts to begin interpreting other search warrants such as this one in a hypertechnical rather than the sensible matter suggested by this Court in *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

II.

The reliability and credibility of the informant in this case was adequately set forth in the affidavit.

Although petitioner is correct in his contention that this Court "has not yet ruled upon the issue of whether or not a 'good citizen' can be credible on its (sic) face without a further showing of underlying circumstances" (Petition for Writ of Certiorari, 7), there is no reason for this Court to make such a ruling since the affidavit does set forth underlying circumstances supporting veracity. The affidavit also conforms with the past recommendations of Mr. Justice Harlan as to how veracity should be established for the "good citizen" informant. See *United States v. Harris*, 403 U.S. 573, 600, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

CONCLUSION

The writ of certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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